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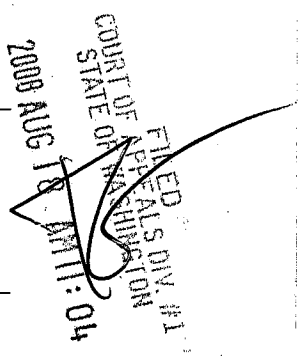

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ROBERT BATES; B&H CONSTRUCTION SERVICES, INC., a Washington corporation; and BANNER BANK (Bellingham), Bond Acct. #3540233253,

Appellants,

vs.

JULIANNE McGUIRE,
Respondent.

APPELLANTS' REPLY BRIEF

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1. **SUMMARY OF ARGUMENT.**

A. In order for the Respondent to be entitled to attorneys fees and costs in this case, she would have to show the following in approximately the following order:

1. That she did not enter into a binding offer and settlement covering "all claims" between the parties including the "claim" in her complaint for attorney fees and costs under RCW 18.27.040(6) and other statutes;

2. If the trial court first found that the Respondent did not execute a binding acceptance of the offer of compromise and settlement, that she also did not otherwise receive "an offer to pay Plaintiff [Respondent] the sum of $2,180.00 in settlement of all claims against the Defendants [Appellant Bates]" pursuant to RCW 4.84.250-280 (which should have been disclosed and presented to the court after trial);

3. A recovery of compensatory damages by the Respondent equal to or more than $2,180.00 after a trial de novo or other final disposition of all issues of fact and law before the court and based, in part, upon the prior entry of a Conclusion by the court that a "breach of contract by a party to a construction contract" as required by RCW 18.27.040(6);

4. A determination by the court after a trial, or other final disposition of all issues before it, that Respondent was the "prevailing party" under RCW 4.84.250-280 where she claimed a total of $2,166.00 for compensatory damages in her complaint and received an offer to settle for a lump sum of $2,180.00 before trial, and

5. A finding by the court that Respondent was a "prevailing party" under RCW 18.27.040(6).

B. What should happen in this case is that the court should:

1. Hold (and/or remand for further consistent proceedings by the trial court) that a valid agreement of compromise and settlement was offered and accepted by the parties and the trial court should enter an order adopting the agreement including the dismissal of all claims between the parties upon the payment of $2,180.00 to the Respondent by the Appellant Bates; or

2. If the court does not think that the Respondent entered into a binding agreement of compromise and settlement, then remand the matter to the trial court for a trial de novo of all the issues between the parties. The trial has to be before a new judge since the original trial judge now knows that there was an arbitration, the results of the arbitration, a settlement offer, and the amount of the settlement offer. He would otherwise need to recuse himself; and

3. After a trial of all the issues between the parties, the new trial judge should then consider all offers of settlement made by either party; and

4. Appellant Bates should be awarded his attorney fees and costs incurred in this proceeding if his appeal is successful under RAP 18.1(a).

C. If the court should (for argument sake only) rule that the Respondent McGuire should be awarded fees, interest and costs in addition to the lump sum settlement offer, the Findings of Fact and Conclusions of Law entered by the court limit the amount of fees and costs the Respondent was entitled to receive. (CP 9-12)

1. Conclusion of Law No. 1 states, "Prior to Plaintiff accepting Defendants' offer of settlement, Plaintiff was not a prevailing party under RCW 18.27.030 (sic) and had no claim for attorney's fees or costs..." (CP 11). The Acceptance of Settlement Offer was executed on February 27, 2007. (CP 49).

2. Conclusion of Law No. 3 states that Respondent "from that moment forward had a right to make a claim for her attorney's fees, costs of suit, and prejudgment interest..." (emphasis added) The Respondent included all fees, costs and pre-judgment interest in the final judgment including those prior to February 27, 2007. (CP 18-24, 67, 7-8)

3. The Respondent also clearly lost the arbitration which amounted to a hearing on her motion for fees and costs which was denied by the arbitrator on March 6, 2007. (CP 7-8)

4. She could not claim to be a "prevailing party" until the entry of the court's final judgment (if at all, since there was no decision on the merits). (CP 78)

2. REPLY TO RESPONDENT'S ARGUMENT THAT THE STANDARD OF REVIEW IN THIS CASE IS WHETHER THE TRIAL COURT ABUSED ITS DISCRETION.

Before a court may exercise its discretion regarding the award of any attorney's fee, it must first determine whether it has the authority to make such an award. As stated in 14A Washington Practice #37.1,

> ...attorney fees are usually taxable only in the nominal amounts specified in RCW 4.84.080, often termed statutory attorney fees. The court has no general authority to award a higher amount. The Washington courts have adhered to the so-called American rule, requiring each side to bear its own attorney fees.

Under the American rule,

> ...a court has no power to award attorney fees as a cost of litigation in the absence of contract, statute or recognized ground of equity providing for fee recovery.

City of Seattle v. McCoy, 112 Wn. App. 26, 30, 48 P3d 993 (2002) quoting Dayton v. Farmers Ins. Group, 124 Wn. 2d 277, 280, 876 P2d 896 (1994).

The applicability of a statute which provides for an award of attorney fees is a question of law. Quality Food Ctrs. v. Mary Jewell T, L.L.C., 134 Wn App. 814, 817, 142 P 3d 206 (2006). The Respondent is correct that an award of attorney fees is reviewed for an abuse of discretion, i.e., whether it was based on tenable grounds or reasons, however where the meaning of an attorney fee statute is at issue, the court on appeal first reviews the decision to award or not award attorney fees de novo as a question of law. Keystone Masonry, Inc. v. Garco Conbstr., Inc., 135 Wn. App. 927, 936-37, 147 P 3d 610 (2006).

In the present case, there was an arbitration award but there was never a "trial de novo". The court in Maulted Mousse, Inc.v. Steinmetz, 150 Wn.2d 518, 530, 79 P3d 1154 (2003) states:

> ...the clear language of RCW 7.06.050 allowing the review of all issues of law and fact set the "minimum scope of issues" available to a trial court...This view is in harmony with the plain language RCW 7.06.050 and MAR 7.1-7.2.

Had there been a "trial de novo" as contemplated, there might have been another basis for an assessment of fees and costs. MAR 7.3 provides for an award based upon whether or not a party "fails to improve the party's position on the trial de novo."

3. REPLY TO RESPONDENT'S ARGUMENT THAT AN OFFER OF SETTLEMENT FOR "ALL CLAIMS" "PURSUANT TO RCW 4.84.250-280" CANNOT ELIMINATE PLAINTIFF'S RIGHT TO RECOVER ATTORNEY'S FEES PURSUANT TO RCW 18.27.040 (6), NOR IS SUCH AN OFFER AND ACCEPTANCE AN UNEQUIVOCAL WAIVER OF THE RIGHT OF ATTORNEY'S FEES.

Without repeating the argument in Appellant's Brief, the Appellant,

a. Agrees that the term "amount pleaded, exclusive of costs" as used in RCW 4.84.250 and RCW 4.84.270 does not include attorney fees.

b. Disagrees that RCW 4.84.250-280 provides a definition of "all claims" which means "only the party's basic underlying claim". (Resp Brief p.8)

c. Disagrees that "CR 68 Offers of Judgment offer helpful analogies and reasoning for this case." (Resp Brief p.130) for the reasons stated in Appellant's Brief 21-22. Respondent cites no cases involving any settlement offers containing the language "all claims" where that language does not include attorney fees and costs.

Bates could only make a lump sum offer of settlement. He could not have added a separate sum for attorney fees. This is very clear under the settlement provisions of RCW 4.84.250-280. To do otherwise would have required a legislative amendment. The Respondent argues at page 12 of her brief that "If Bates had wished to make a "lump sum" offer, Bates should not have restricted his offer by using RCW 4.84.250-280 statutory scheme". On the contrary, this is precisely why Bates used the small claims settlement statute. Under RCW 4.84.250, if a defendant prevails (i.e., "if the recovery, exclusive of costs, is the same of less than the amount offered in settlement by the defendant" per RCW 4.84.270), "there

shall be taxed and allowed to the prevailing party as part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees." Respondent may be confusing "the amount pleaded by the prevailing party...exclusive of costs" (which is the measure of whether a party is prevailing) with the meaning of "all claims" as used in an offer of compromise and settlement.

The decision allegedly miscited by Bates is Roberts v. Bechtel, 74 Wn.App. 685, 875 P2d 14 (1994). To Respondent's benefit, the decision is short but could be better worded. Nevertheless, at page 687, the court states,

> Ms. Bechtel contends the award of expenses is precluded by the terms of the release and settlement. We agree.
>
> ...
>
> The language of the release is plain and unambiguous; Ms. Roberts released Ms. Bechtel from any and all claims resulting or developing from the accident. The claim of frivolous litigation is a claim arising from the accident.

Ms. Roberts had sought "an award of expenses, including attorney fees". The stipulation for dismissal between counsel cited by Respondent reinforced the court's holding.

Respondent's discussion of Bumbal v. Smith, 165 P3d 844 (Colo.App. 2007) is supportive. As Respondent indicates in her Brief at p. 16, Bumbal adopted "all claims" cases which "interpreted release language as inclusive of attorney's fees and costs". The cited cases

support Bates' intended use of the language in his offer of compromise and settlement which Respondent accepted.

4. REPLY TO RESPONDENT'S ARGUMENT THAT PLAINTIFF DID RECEIVE A JUDGMENT AGAINST BATES AND THEREFORE IS THE"PREVAILING PARTY".

The term "prevailing party" may be defined by the statute which is the basis for an award of attorney fees and costs or it may be defined by the contract between the parties. Usually the term is not defined. As shown below, in order for the Respondent to be a "prevailing party" under RCW 4.84.250-280, she must meet the terms of the statute and achieve a "recovery" after a final disposition on the merits which exceeds the "amount offered in settlement by the plaintiff". In order to be a "prevailing party" under RCW 18.27.040(6), the Respondent must have achieved a judgment on the merits which was explicitly premised on a finding/conclusion that there had been "a breach of contract by a party to a construction contract" by the Appellant.

As indicated in Appellant's Brief, the court in Bumbal v. Smith, 165 P.3d 844 (Colo.App. 2007) cites, at p. 846, the case of Util. Automation 2000, Inc. v. Choctawhatche Elec. Co-op, 298 F.3d 1238 (11th Cir. 2002) in support of its holding that "all claims" unambiguously includes attorney fees where the only claim for attorney fees appears in the complaint. The complaint is the source of the only claim for attorney fees in our case.

The court there also held that even though, under wording of the CR 68 offer before it, a party was not entitled to an award of attorney fees under the CR 68 "costs then accrued" language, the party nevertheless was entitled to attorney fees based upon the language of the parties' contract which provided for an award of fees and costs to the "prevailing party". The contract there did not define "prevailing party". The Bates-McGuire contract did not mention fees or costs or the term "prevailing party".

The Choctawhatche court at ppgs 1248-49 discusses at length the meaning of the term "prevailing party". The court quotes liberally from the decision in Buckhannon Bd.& Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) in which the Supreme Court clarified who a prevailing party is in a court order for the purpose of awarding attorney's fees. The Court's analysis in Buckhannon was meant to apply to statutes other than the two at issue in that case. Bennet v. Yoshina, 259 F.3d 1097, 1100 (9th Cir. 2001).

In the United States, parties are ordinarily required to bear their own attorney fees; the prevailing party is not entitled to collect from the loser. Buckhannon at p. 602. Under this "American Rule", we follow "a general practice of not awarding fees to a prevailing party absent explicit statutory authority." Key Tronic Corp. v. United States, 511 U.S. 809, 819, 128 L.Ed.2d 797, 114 S.Ct. 1960 (1994) quoted by Buckhannon at

532 U.S. 602. The court continues in footnote 8 at 532 U.S. 606 quoting from a number of prior Court decisions, "[b]y the long established practice and universally recognized rule of the common law... the prevailing party is entitled to recover a judgment for costs," but "the rule 'has long been that attorney's fees are not ordinarily recoverable'." In our case, a party can prevail under the settlement provisions of RCW 4.84.250 –280 after a "recovery" or final disposition is achieved on the merits. This was never accomplished.

The court in Buckhannon defines a prevailing party in accord with Black's Law Dictionary 1145 (7th ed.) as "a party in whose favor a judgment is rendered, regardless of the amount of damages". The court then adds to the definition. In order for there to be a prevailing party, there must be a "material alteration of the legal relationship of the parties" and a "necessary judicial *imprimatur"* or judicial oversight of the alteration. The court reinforces the need for a judicial *imprimatur* by noting at *Id.* at 605-06:

> We only awarded attorney's fees where the plaintiff has received a judgment on the merits, ...or obtained a court-ordered consent decree,...we have not awarded attorney's fees where the plaintiff has secured the reversal of a directed verdict, ...or acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by "*judicial* relief"....Never have we awarded attorney's fees for a nonjudicial "alteration of actual circumstances."...We cannot agree that the term "prevailing party" authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivilous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the "sought-after destination" without any judicial relief. (Citations omitted; emphasis provided by the court)

The 9th Circuit in P.N. v. Seattle School Dist. No. 1, 474 F.3d 1165, 1171 (9th Cir. 2007) restates the post-Buckhannon holding of Shapiro v. Paradise Valley Unified Sch.Dist., 374 F.3d 857, 865 (9th Cir. 2004) as follows:

> We held that "[e]ssentially, in order to be considered a prevailing party after Buckhannon, a plaintiff must not only achieve some material alteration of the legal relationship of the parties, but *that change must also be judicially sanctioned."* (emphasis added by court)

For a while in the post-Buckhannon era, it appeared that the 9th Circuit might be the only Circuit which held that a plaintiff who had entered into a private settlement agreement could be a prevailing party without a judicial sanction component. See e.g. Barrios v. Cal. Interscholastic Fed'n, 277 F.3d 1128 (9th Cir. 2003). P.N. v Seattle makes it clear that this is not the case. In P.N. at p. 1171, the court notes that it adopts the Buckhannon definition of "prevailing party".

5. REPLY TO RESPONDENT'S ARGUMENT THAT A PARTY CAN "PREVAIL" EVEN WITHOUT AN AFFIRMATIVE JUDGMENT BEING ENTERED.

A party may be a "prevailing party" under the provisions of one very limited statute without the benefit of a judgment on the merits. Andersen v. Gold Seal Vineyards, Inc., 81 Wn.2d 863, 505 P.2d 790 (1973) provides a very narrow holding which is that a defendant who is dismissed upon a plaintiff's motion for a voluntary nonsuit is a prevailing party for purposes

of the long-arm statute (RCW 4.28.185) which permits the award of costs and attorneys' fees to a defendant who is personally served outside the state and prevails in the action. As the court indicates at p. 866, it was faced with "equitable cognizance" of the situation of a foreign defendant and adds at p.868,

> ...a defendant who has been served outside the state and has been put to the expense in answering the complaint and preparing for trial should be reimbursed by the plaintiff if the court finds that the justice of the case requires it.

The court in Beckman v. Wilcox, 96 Wn. App. 355, 361-62, 979 P.2d 890 (1999) lists several cases where statutory or contractual provisions authorize an award of fees "when a complaint has been dismissed voluntarily". It adds that "in the Washington and federal cases, the trial court's power to award fees after a voluntary dismissal turns on whether the claimant meets the conditions of the statute authorizing fees."

The Beckman court at p. 361 cites an example of the opposite result with respect to other statutes stating,

> The attorney fee statute in Cork Insulation, RCW 4.84.250, provided for attorney fees to the "prevailing party", 54 Wn.App. at 704. Because there can be no "prevailing party" as that term is used in RCW 4.84.250 and .270 until after entry of judgment, a pretrial voluntary dismissal makes the attorney fee provision inapplicable.

Citing Cork Insulation Sales Co. Inc. v. Torgeson, 54 Wn. App. 702, 775 P.2d 970 (1989)

In our case, there are no similar facts or equities to those in Anderson. A defendant contractor prevailed in arbitration and later lost without the benefit of a trial.

6. REPLY TO THE RESPONDENT'S ARGUMENT THAT THE LEGISLATIVE HISTORY OF RCW 18.27. 040(6) SUPPORTS THE APPLICATION OF THE ANDERSON V. GOLD SEAL VINEYARD HOLDING TO THIS CASE.

To stretch the equities in Anderson (as discussed in the section immediately above) to encompass the present case would better be left to a legislative determination especially in a case such as this one where the contractor was denied his right to a trial on the merits and his claims were basically involuntarily dismissed by the court.

Unlike the condominium owners in Eagle Point Condo. Owners Assoc. v. Coy, 102 Wn. App 697, 9 P. 3d 898 (2000), Respondent in this case had an offer to settle of more than the amount she requested in her complaint for compensatory damages which offer was made before the arbitration hearing occurred. The Respondent also lost the arbitration; the arbitrator held that she had accepted the Appellant's offer of compromise and settlement for a lump sum of $2,800.00 and denied her motion for fees and costs. She thus could have made use of the money all during the time before the court entered the final order. The Judgment entered by the trial court contained no determination of the merits of the case; it only spoke to

fees, costs and interest. (CP 7-8) Unlike our case, the ruling in the Eagle Point case was entered only after a full trial on the merits.

Respondent raises the possibility of a conflict between RCW 4.84.250-280 and RCW 18.27.040 (6). RCW 4.84.250-280, the so-called "settlement offer statute" applies "in any action for damages" where the amount pleaded by the prevailing party (as defined in the act) is $10,000.00 or less. See RCW 4.84.250. RCW 18.27.040(6) provides "[t]he prevailing party in an action filed under this section against the contractor... is entitled to costs, interest, and reasonable attorneys' fees." The statute does not define "prevailing party." RCW 4.84-250-280 does define the term.

In Kingston Lumber v. High Tech Development, 52 Wn.App. 864, 765 P.2d 27 (1988) the court was faced with reconciling two statutes which dealt with attorneys' fees, RCW 60.04.130 regulating mechanic's lien foreclosures and RCW 4.84.250 which applies to all damage actions involving $10,000.00 or less. The Kingston court first attempted to apply the rule of statutory construction which prefers a special statute to a general one. They reasoned that both statutes were general and both were also special. In the case of RCW 4.84.250, they reasoned at p.866 that,

> RCW 4.84.250 is "general" in the sense that it applies to all types of damage actions, but is also "special" in the sense that it is limited to those cases involving $10,000.00 or less.

The court eventually harmonizes the two statutes noting that "RCW 4.84.250 does not require any award which RCW 60.04.130 would prohibit." The court then chooses to apply RCW 4.84.250 holding at p. 867 that the landowner "is entitled to his fees under RCW 4.84.250 if he has demonstrated that he is a 'prevailing party'".

The present case is analogous. Both RCW 4.84.250 and RCW 18.27.040(6) seem to apply. Both have their special aspects. RCW 18.27.040(6) or related statutes do not define "prevailing party".; RCW 4.84.250-280 does. Neither, thus requires anything that the other would prohibit since both award fees to the "prevailing party". In determining who the "prevailing party" is, the provisions of RCW 4.84 must apply when the two are harmonized.

7. REPLY TO ARGUMENT THAT A "PREVAILING PARTY" UNDER RCW 4.84.270 IS ONE WHO, ABSENT ANY AFFIRMATIVE JUDGMENT, IS VOLUNTARILY DISMISSED FROM A CASE BY THE PLAINTIFF.

There may be a possible conflict in case law on this issue. This issue was presented in a case which has been accepted for review by the Washington Supreme Court. Wachovia SBA Lending v. Kraft, 138 Wn. App 854, 158 P.3d 1271(2007), accepted for review 163 Wn. 2d 1011, 180 P.3d 1291 (2008).

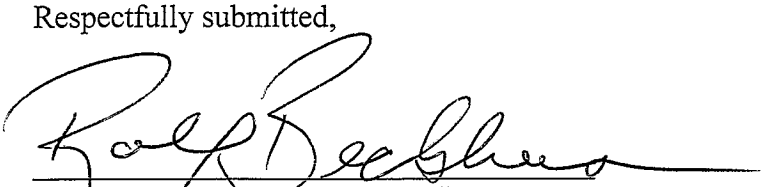
8. REPLY TO ARGUMENT THAT JUDGMENTS ENTERED PURSUANT TO CR 68, AND OTHER CASES, MAY RESULT IN AN AWARD OF ATTORNEYS' FEES, WHEN NO DETERMINATION OF THE MERITS OF THE CLAIM IS MADE.

The Respondent in this case accepted a binding offer of settlement drafted in compliance with RCW 4.84.250-280. She also had the prior advice of counsel who fully understood what the offer of settlement included and what is included and not included under a small claim settlement offer made pursuant to RCW 4.84.250-280. She cannot now claim she did not understand.

9. REPLY TO RESPONDENT'S REQUEST FOR ATTORNEY'S FEES UNDER RAP 18.1.

Appellant never had the opportunity to tender its RCW 4.84.250-280 claim to the court because they were denied a trial on the merits. If this court should rule that a trial on the merits is not required and that the offer and acceptance of the settlement offer was not binding on the Respondent and that a party nevertheless prevailed at the trial court level and that a party prevailed at the appellate level, the Appellant requests that it be awarded its fees and costs as were reasonably attributable to defending this matter at the trial court level and the appellate level pursuant to RAP 18.1 (a) (if this court's decision is that Bates prevailed). Where a statute authorizes fees to the prevailing party, they are available on appeal as well as in the trial court. Ur-Rahman v. Changchun Dev. Ltd., 84 Wn.App 569, 576, 928 P2d 1149 (1997).

Respectfully submitted,



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Attorney for Appellant

APPENDIX

V. APPENDIX.

RCW 18.27.040(6)

(6) The prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract by a party to a construction contract, is entitled to costs, interest, and reasonable attorneys' fees. The surety upon the bond is not liable in an aggregate amount in excess of the amount named in the bond nor for any monetary penalty assessed pursuant to this chapter for an infraction.

RCW 4.84.250 ATTORNEYS' FEES AS COSTS IN DAMAGE ACTIONS OF TEN THOUSAND DOLLARS OR LESS — ALLOWED TO PREVAILING PARTY.

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

RCW 4.84.260 ATTORNEYS' FEES AS COSTS IN DAMAGE ACTIONS OF TEN THOUSAND DOLLARS OR LESS — WHEN PLAINTIFF DEEMED PREVAILING PARTY.

The plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief, as set forth in RCW 4.84.280.

RCW 4.84.270 ATTORNEYS' FEES AS COSTS IN DAMAGE ACTIONS OF TEN THOUSAND DOLLARS OR LESS — WHEN DEFENDANT DEEMED PREVAILING PARTY.

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

RCW 4.84.280 ATTORNEYS' FEES AS COSTS IN DAMAGE ACTIONS OF TEN THOUSAND DOLLARS OR LESS — OFFERS OF SETTLEMENT IN DETERMINING.

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to trial. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of the fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorneys' fees as set forth in RCW 4.84.250.